

**UNITED STATE DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION**

TCF NATIONAL BANK

Plaintiff,

v.

BEN S. BERNANKE, *et al*

Defendants

Case No. 4:10-cv-04149-LLP

**MOTION OF THE MERCHANT PAYMENTS COALITION
FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS**

Steven W. Sanford
CADWELL SANFORD DEIBERT & GARRY LLP
200 E. 10th Street, Suite 200
Sioux Falls, South Dakota 57101

Shannen W. Coffin*
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

** pro hac vice motion pending*

Counsel for Merchants Payment Coalition

The Merchants Payment Coalition (“MPC”) respectfully moves for leave to file a brief *amicus curiae* in support of the Defendants. All parties have consented to the filing of MPC’s *amicus curiae* brief, which will be separately submitted today.

The MPC is a non-profit coalition with more than 20 national trade association members and 80 state trade association members.¹ These associations represent merchant businesses in every state in the nation with diverse business models including convenience stores, gas stations, restaurants, supermarkets, drug stores, department stores, book stores, on-line merchants, and many other types of retailers. Collectively, MPC trade associations represent merchants with approximately 2.7 million stores employing about 50 million people. These businesses pay very significant fees in order to accept debit and credit cards. For most merchants, aggregate interchange fees exceed all other operating costs except labor costs. Many of these retailers pay more money in card fees each year than they make in pre-tax profits.

The mission of the MPC is to help bring about a more competitive and transparent card system that works better for merchants and consumers alike. The MPC has pursued several avenues to achieve this goal. One such avenue has been advocacy before the United States Congress – including support of the Durbin Amendment which became part of the Dodd-Frank Wall Street Reform and Consumer Financial Protection Act of 2010.² Prior to the passage of this legislation, the MPC and its member associations submitted testimony on the subject of debit and credit card interchange fees in six different Congressional hearings before Committees including the House Energy and Commerce Subcommittee on Commerce, Trade and Consumer

¹ MPC member organizations are listed in Appendix A to this Motion.

² The Durbin Amendment is section 1075 of the Act. *See* Pub. L. No. 111-203; 124 Stat. 1376, 2068 (codified at 15 U.S.C. § 1693o-2).

Protection; the House Judiciary Committee; the Antitrust Task Force of the House Judiciary Committee; the House Financial Services Committee; and the Senate Judiciary Committee.³

In light of the substantial impact of interchange fees on their day-to-day business operations, MPC members have a significant interest in defending the Durbin Amendment's reasonable regulation of those fees. MPC believes that its *amicus curiae* brief will substantially assist the Court's resolution of this case by highlighting the nature of the interchange market, the legislative history of the Durbin Amendment, and the pro-competitive and pro-consumer rationale for the statute. MPC respectfully requests leave of this Court to file an *amicus curiae* brief.

³ See *Credit Card Fair Fee Act of 2009: Hearing on H.R. 2695 Before the H. Comm. on the Judiciary*, 111th Cong. (Comm. Print Apr. 28, 2010); *H.R. 2382, The Credit Card Interchange Fees Act of 2009*; and *H.R. 3639, The Expedited Card Reform for Consumers Act of 2009: Hearing Before H. Comm. on Fin. Servs.*, 111th Cong. (Comm. Print Oct. 8, 2009); *Credit Card Fair Fee Act of 2008: Hearing on H.R. 5546 Before the Task Force on Competition Policy and Antitrust Laws of the H. Comm. on the Judiciary*, 110th Cong. (May 15, 2008); *Credit Card Interchange Fees: Hearing Before the Antitrust Task Force of the H. Comm. on the Judiciary*, 110th Cong. (July 19, 2007); *Credit Card Interchange Fees: Antitrust Concerns?: Hearing Before the S. Comm. on the Judiciary*, 109th Cong., H.R. Rep. J-109-100 (July 19, 2006); *The Law and Economics of Interchange Fees: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 109th Cong. (Feb. 15, 2006).

Respectfully submitted,

____/s/ *Steven W. Sanford*_____

Steven W. Sanford
CADWELL SANFORD DEIBERT & GARRY LLP
200 E. 10th Street, Suite 200
Sioux Falls, South Dakota 57104
Phone: (605) 336-0828
Fax: (605) 336-6036
E-mail: *ssanford@cadlaw.com*

Shannen W. Coffin
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000
E-mail: *scoffin@steptoe.com*

Counsel for Merchants Payment Coalition

--Electronically Filed--

APPENDIX A. Member Associations of Merchant Payment Coalition

National and international association members of the MPC include:

Food Marketing Institute
National Association of Convenience Stores
National Grocers Association
National Retail Federation
National Association of Chain Drug Stores
Retail Industry Leaders Association
National Restaurant Association
Petroleum Marketers Association of America
National Council of Chain Restaurants
National Association of College Stores
National Association of Truck Stop Operators
International Association of Airport Duty Free Stores
National Association of Theatre Owners
American Beverage Licensees
Bowling Proprietors Association of America
National Association of Shell Marketers
Interactive Travel Services Association
Society of American Florists
Society of Independent Gasoline Marketers of America
International Franchise Association
National Franchisee Association
Coalition of Franchisee Associations
National Small Business Association
Digital Media Association
Professional Beauty Association.

APPENDIX A. Member Associations of Merchant Payment Coalition (cont).

State association members of the MPC include:

Alabama Grocers Association
Petroleum & Convenience Marketers of Alabama
Arizona Food Marketing Alliance
California Grocers Association
California Retailers Association
California Independent Grocers Association
Colorado Licensed Beverage Association
Colorado Petroleum Marketers and Convenience Stores Association
Connecticut Retail Merchants Association
Independent Connecticut Petroleum Association
Delaware Food Industry Council; Florida Petroleum Marketers
Georgia Food Industry Association
Georgia Oilman's Association, Inc.
Illinois Retail Merchants Association
Indiana Licensed Beverage Association
Indiana Retail Council
Petroleum Marketers and Convenience Stores of Iowa
Kansas Licensed Beverage Association
Petroleum Marketers and Convenience Store Association of Kansas
Kentucky Grocers Association and Kentucky Association of Convenience Stores Louisiana
Retailers Association
Maryland Retailers Association
Retailers Association of Massachusetts
Massachusetts Licensed Beverage Association
Michigan Grocers Association
Minnesota Grocers Association
Minnesota Licensed Beverage Association
Retail Association of Mississippi
Ozark Empire Grocers Association
Missouri Petroleum Marketers and Convenience Store Association
Montana Petroleum Marketers & Convenience Store Association
Nebraska Petroleum Marketers & Convenience Store Association
Nevada Petroleum Marketers & Convenience Stores Association
New England Convenience Store Association
Independent Oil Marketers Association of New England
Retail Merchants Association of New Hampshire
New Hampshire Grocers Association
New Jersey Food Council
New Jersey Gasoline-C-Store-Automotive Association
New Mexico Retail Association
Empire State Petroleum Association

Empire State Restaurant & Tavern Association
The Food Industry Alliance of New York State
North Carolina Association of Convenience Stores
North Carolina Retail Merchants Association
North Dakota Petroleum Marketers Association
North Dakota Retailers Association
Ohio Grocers Association
East Central Ohio Food Dealers Association
Cleveland Food Dealers Association
Oklahoma Petroleum & Convenience Store Association
Oregon Petroleum Association
Pennsylvania Food Merchants Association/Pennsylvania Convenience Store Council
Pennsylvania Retailers Association
Rhode Island Food Dealers Association
South Carolina Retail Association
South Carolina Petroleum Marketers Association
South Dakota Association of Convenience Stores
South Dakota Retailers Association
South Dakota Petroleum & Propane Marketers Association
Tennessee Grocers & Convenience Store Association
Tennessee Oil Marketers Association
Tennessee Retail Association
Texas Grocery & Convenience Association
Texas Petroleum Marketers and Convenience Store Association
Texas Retailers Association
Utah Food Industry Association
Utah Retail Merchants Association
Utah Petroleum Marketers & Retailers Association
Vermont Grocers' Association
Virginia Petroleum, Convenience and Grocery Association
Washington Food Industry
Washington Oil Marketers Association
West Virginia Oil Marketers & Grocers Association
West Virginia Motor Truck Association
Tavern League of Wisconsin
Wisconsin Petroleum Marketers & Convenience Store Association
Wyoming Petroleum Marketers & Convenience Stores Association
Wyoming Retail Merchants Association
Wyoming State Liquor Association.

CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing Motion of the Merchant Payments Coalition for Leave to File Brief *Amicus Curiae* in Support of Defendants with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to the following counsel:

- **William E. Blewett**
bill@meierhenrylaw.com
- **Sarah E. Bushnell**
sbushnell@kellyhannahlaw.com
- **Thomas W. Clayton**
twc.clo@midconetwork.com
- **Bradley H. Cohen**
bradley.cohen@usdoj.gov
- **Richard Allen Epstein**
repstein@uchicago.edu, richard.epstein@nyu.edu
- **Timothy D. Kelly**
tkelly@kellyhannahlaw.com
- **Mark V. Meierhenry**
mark@meierhenrylaw.com
- **Ronald A. Parsons, Jr**
ron@jhalawfirm.com
- **Vincent M. Roche**
vmr@dehs.com, cam@dehs.com
- **Diana J. Ryan**
diana.ryan@usdoj.gov
- **Steven W. Sanford**
ssanford@cadlaw.com, gleisinger@cadlaw.com
- **Clint L. Sargent**
clint@meierhenrylaw.com
- **Nathan Michael Swinton**
Nathan.M.Swinton@usdoj.gov
- **Thomas K. Wilka**
tom@hwalaw.com, ehealy@hwalaw.com

A true and correct copy of the same was on this same date mailed, by U.S. mail, postage prepaid, to:

J. Laddie Montague, Jr
Berger & Montague, P.C.
1622 Locust Street
Philadelphia, PA 19103

Bonny Sweeney

Robbins Geller Rudman & Dowd LLP
655 West Broadway, Suite 1900
San Diego, CA 92101

Thomas J. Undlin

Robins, Kaplan, Miller & Ciresi, L.L.P.
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402-2015

K. Craig Wildfang

Robins, Kaplan, Miller & Ciresi, L.L.P.
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402-2015

Joseph J. Witt

President/CEO
Minnesota Bankers Association
9521 West 78th Street
Eden Prairie, MN 55344

Todd J. Zywicki

GMU Foundation Professor of Law
Editor, Supreme Court Economic Review
George Mason University School of Law
3301 Fairfax Drive
Arlington, VA 22201

Dated: March 4, 2011

Respectfully submitted,

____/s/ *Steven W. Sanford*_____

Steven W. Sanford
CADWELL SANFORD DEIBERT & GARRY LLP
200 E. 10th Street, Suite 200
Sioux Falls, South Dakota 57104
Phone: (605) 336-0828
Fax: (605) 336-6036
E-mail: ssanford@cadlaw.com

Shannen W. Coffin
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000
E-mail: *scoffin@steptoe.com*

Counsel for Merchants Payment Coalition

--Electronically Filed--